

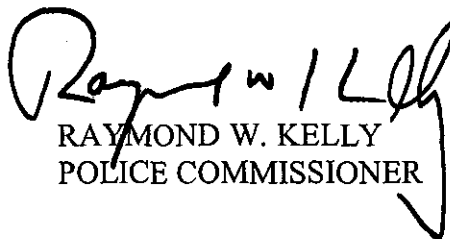


POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Erik Pilger : ORDER
Tax Registry No. 933182 : OF
Brooklyn Court Section : DISMISSAL
-----X

Police Officer Erik Pilger, Tax Registry No. 933182, Shield No. 31865, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 84186/08, as set forth on form P.D. 468-121, dated June 16, 2008, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Erik Pilger from the Police Service of the City of New York.


RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: June 16, 2009



POLICE DEPARTMENT

April 27, 2009

-----X
In the Matter of the Charges and Specifications : Case No. 84186/08
- against - :
Police Officer Erik Pilger :
Tax Registry No. 933182 :
Brooklyn Court Section :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Stephen C. Worth, Esq.
Worth, Longworth & London, LLP
111 John Street, - Suite 640
New York NY 10038

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

The above-named member of the Department appeared before me on December 9, 2008 and January 6, 2009, charged with the following:

1. Said Police Officer Erik Pilger, assigned to the Brooklyn Court Section, while a Probationary Police Officer on or about November, 2003, at a location known to the Department, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department in that said Officer, in exchange for settling an account balance owed for merchandise purchased, unlawfully gave an unauthorized firearm to an individual, identity known to the Department.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

NYS PENAL LAW 265.11 – CRIMINAL SALE OF A FIREARM IN THE
THIRD DEGREE

2. Said Police Officer Erik Pilger, assigned to the Brooklyn Court Section, while a Probationary Police Officer on or about November, 2003, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department in that said Officer unlawfully possessed a defaced firearm.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

NYS PENAL LAW 265.02 (3) – CRIMINAL POSSESSION OF A WEAPON IN
THE THIRD DEGREE

NYS PENAL LAW 265.01 (1) – CRIMINAL POSSESSION OF A WEAPON IN
THE FOURTH DEGREE

3. Said Police Officer Erik Pilger, assigned to the Brooklyn Court Section, on or about May, 2008, utilized Department computers for a non-Department or other unauthorized purpose, in that he performed a computer inquiry on his brother, identity known to the Department.

P.G. 203-06, Page 1, Paragraph 15 – PROHIBITED CONDUCT

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office, and the Respondent was represented by Stephen C. Worth, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that in 2003 when the Respondent was a Probationary Police Officer undergoing recruit training at the Police Academy, he went to the New York Police Shop in Middle Village, Queens, New York, on about ten occasions. He purchased his recruit equipment there and he placed an order for the purchase of a New York City Police Officer dress uniform. It was at this time that he met Freddie Mercado, who was employed by the New York Police Shop.

The Department's Case

The Department called Freddie Mercado and Sergeant Michael Donovan as witnesses.

Freddie Mercado

Mercado testified that he is presently incarcerated at [REDACTED].

He was arrested on December 29, 2007, in possession of a .40 caliber pistol and a .9 millimeter pistol. In May, 2008, he pleaded guilty to two counts of Attempted Criminal Possession of a Weapon in the second degree, a class D felony. He received a sentence of two one-year prison terms to be served consecutively at [REDACTED].

Mercado acknowledged that he is seeking a reduced sentence. The [REDACTED] Assistant District Attorney who is prosecuting his case has told him that he will make the sentencing judge aware of his cooperation and his testimony at this disciplinary trial.

Mercado has a prior conviction. [REDACTED]
[REDACTED]
[REDACTED]

Mercado recalled that he first met the Respondent in 2003 when Mercado was working the sales register at the New York Police Shop ("the shop"). The shop's owner, Peter Martinez, had hired Mercado in 2002. Mercado recalled that the Respondent was a frequent visitor to the shop and would bring pizza and coffee with him when he came into the shop. In November, 2003, the Respondent ordered a "Class A uniform package." Mercado estimated that at that time a "Class A uniform package" cost about \$300 to \$400. The Respondent still owed the shop about \$140 to \$160 on this uniform package on the day when he came into the shop and told Mercado that he had a .22 caliber pistol with a defaced serial number that belonged to his mother who used it for security. The Respondent told Mercado, "It's an illegal gun." The Respondent then told Mercado, "I'll trade you this .22 to cover the balance I owe" on the uniform package. Mercado testified that he agreed that he would mark the Respondent's uniform order as paid in full in exchange for receiving the gun. He and the Respondent went downstairs to the basement

of the shop so that they could be alone and out of sight of the shop's tailor who worked upstairs. In the basement, the Respondent handed him a .22 caliber pistol with a defaced serial number. Mercado was shown a pistol in the Trial Room and he identified it as the .22 caliber pistol with a defaced serial number that the Respondent had handed him (DX 1 for identification only). Mercado testified that to prevent Martinez from discovering that the Respondent had not actually paid the balance due, he wrote "paid in full" on the Respondent's receipt and he "made up" the \$140 to \$160 the Respondent owed on his uniform package through other cash sales.

Mercado testified that he suffers from depression, anxiety and paranoia. In December, 2007, he was living with former Police Officer Wanda Velez who left the Department after she received a three-quarters disability pension. Mercado recalled that on Christmas Day, December 25, 2007, he attempted to commit suicide by shooting himself with the .22 caliber pistol he received from the Respondent. Mercado testified that he fired a shot at his leg in an attempt to sever an artery so that he would bleed to death. The bullet is still lodged inside his body and the bullet wound necessitated the removal of his left kidney. He had nine other handguns in a safe. After he was arrested, he telephoned Velez and told her to call his friend Ray Carasco and to tell him to pick up these guns and hide them. Mercado admitted that when investigators questioned him about where he had obtained the defaced .22 caliber pistol, he falsely asserted that he had "found" the pistol because he did not want to involve the Respondent in the trouble he had created for himself by shooting himself.

Mercado testified that when he was interviewed by Sergeant Michael Donovan of the Department's Internal Affairs Bureau ("IAB"), he proposed to Donovan that he place

a call to the Respondent's cell phone and that Donovan tape record the telephone conversation during which he would try to get the Respondent to talk about the exchange of the .22 caliber pistol. Mercado placed calls to the Respondent's cell phone and engaged in two tape-recorded controlled conversations with the Respondent, the first on April 28, 2008, and the second the next day.

On cross-examination, Mercado testified that he feels fine now because he is taking two medications for depression, anxiety and paranoia. He admitted that he attempted to play a joke on a state trooper by posing as a trooper by showing him a phony state police ID. He acknowledged that by doing this he committed a crime, that it was not funny and that the trooper should have arrested him. Mercado acknowledged that when he attempted to commit suicide by shooting himself on December 25, 2007, he used the .22 caliber pistol, the smallest gun he had in his residence that day, rather than the shotgun, and the .38 caliber and .9 and .10 millimeter firearms he possessed. He admitted that after he had placed the barrel of the .22 in his mouth he had removed it because he had changed his mind. He then pointed the .22 at his groin area and pulled the trigger. He denied that he had shot himself because he had argued with Velez who left the Department on a psychiatric disability. He asserted that it was his intent to commit suicide when he shot himself because at the time he was "insane" on Christmas Day. He has filed a lawsuit against the Respondent and the City of New York. He asserted that the Respondent had taken items from the store without paying for them. He did not tell investigators about this and clandestine meetings with the Respondent because he wanted to "minimize everything."

Mercado acknowledged that if he had refused to testify at this proceeding he would be re-sentenced regarding his conviction and could face significantly more prison time. No investigator ever showed him the receipt he had marked paid in full for the Respondent. He initially could not recall that it was in November, 2003, that the Respondent had handed him the .22 pistol because he was on heavy medication. He admitted that when he worked in the store he sometimes wore a holster containing an imitation gun because he wanted the tailor and Velez and everyone else to believe that he had a permit to carry a firearm. He agreed that he had called the police to report a man who had tried to buy police equipment at the shop. He provided information to the police about Ray Carasco possessing guns and about someone in California who had mailed him guns. He testified that he carried police ID items on his person in 1983 as a joke, not so that he could actually impersonate being a police officer.

He has filed a lawsuit against the Respondent because he believes that the Respondent was partly responsible for his attempted suicide and that he is still suicidal. Mercado testified that as best he could recall in November, 2003, a Class A uniform cost "\$300 and change." Mercado conceded that in November, 2003, a Class A uniform may have cost as much as \$600.

Sergeant Michael Donovan

Sergeant Donovan, who is assigned to IAB Group 11, recalled that when he initially interviewed Mercado, it was Mercado who brought up the subject of getting the Respondent talking "on tape" about the exchange of the .22 caliber pistol and that

Mercado had volunteered that he would be willing to initiate a tape-recorded controlled conversation with the Respondent regarding the gun.

On April 28, 2008, Donovan had Mercado place a call to the Respondent's cell phone. Donovan tape recorded this telephone conversation [Department's Exhibit (DX) 2] (The tape recording reflects the following conversation).¹

RESPONDENT: Hello?
MERCADO: Erik?
RESPONDENT: Hi. Who's this?
MERCADO: This is Freddy man, what's up?
RESPONDENT: Freddy from where?
MERCADO: From the Police Shop.
RESPONDENT: Hey, what's going on, buddy?
MERCADO: How are things, man?
RESPONDENT: Pretty good. I'm on 125th Street. Listen I got you a little something. I got you a bottle of Tequila because I got one for, I got, I got a...
MERCADO: I thought you fell off the side of the earth.
RESPONDENT: Huh?
MERCADO: I said I thought you fell off the side of the earth. Are you at Port Authority yet?
RESPONDENT: No. We, we all got blackballed from the Port Authority, the Police Department. What happened was at NYPD they didn't want to release our CPI.
MERCADO: I have no idea what that is.
RESPONDENT: So (inaudible) in the house.
MERCADO: I have no idea what that is.
RESPONDENT: Yeah a CPI it's like a diary, it's like a whole history.
MERCADO: Oh, oh your, your employment record. I mean your...
RESPONDENT: Oh, yeah, yeah, employment record.
MERCADO: Okay.
RESPONDENT: And that's about it, you know and then, now there's no NYPD cop can go to Port Authority.
MERCADO: No shit? Wow.
RESPONDENT: Yeah. How you doing?

¹ The following recitation of who said what and the words that were spoken during this conversation differs from the transcript offered by the Assistant Department Advocate (DX 2A). In addition to referring to the Respondent as "Mr." and misspelling his first name, the Department's transcript contains a number of instances where words spoken by Mercado are attributed to the Respondent and *vice versa*. Also, portions of this conversation which are cited as "inaudible" on the transcript are audible on the tape recording of the conversation (DX 2).

MERCADO: The same old shit. Have you, you know listen what you going to do with this Port Authority thing? You're going, you're just going to leave it alone?

RESPONDENT: Well we just, we're not doing (inaudible). We sued. We won. The city appealed and lost so they took it to the appellate court and they won the, they won it in the appellate court.

MERCADO: Oh, oh.

RESPONDENT: Now they, it was a big mess. We tried. I probably would have got on too (inaudible) you know and uh...I made over a hundred collars.

MERCADO: Right.

RESPONDENT: I got 15 EPD's and all meritorious.

MERCADO: Very nice.

RESPONDENT: I'm trying to go to Borough Crime. I'm taking the Sergeant's test. I took the last one. I got a 64 on it.

MERCADO: Where you working now man?

RESPONDENT: I work in Manhattan North Task Force. Hold on a second...

MERCADO: Oh the (inaudible)...oh okay, I was trying to remember what command you worked out of. I could have sworn you worked out the 19th.

RESPONDENT: Yeah, no, I...[Radio transmission is heard in background] hold on. Hold on a second.

MERCADO: Yeah brother.

RESPONDENT: Let me, let me call you right back.

MERCADO: I'll hold on. I'm not at work.

RESPONDENT: Where are you?

MERCADO: Let me just ask you something really quick.

RESPONDENT: Okay.

MERCADO: I'm going to tell you why I called. Remember that little thing you gave me that belonged to your mother?

RESPONDENT: Yeah.

MERCADO: A little twenty-two.

RESPONDENT: Yeah.

MERCADO: Remember the day you gave me that thing? Did you take it? Because Pete's renovating the basement and I don't want him to find it.

RESPONDENT: No. You said, with, with you said you said you was going....hold on...

MERCADO: You know you ...hold on. (Inaudible).

RESPONDENT: Harry, I got to call you right back.

MERCADO: No, no listen, dude...

RESPONDENT: [Appears to be speaking to radio dispatcher]

MERCADO: You don't have it? Did you, did you take it because I...

RESPONDENT: No. I don't have nothing.

MERCADO: Okay. All right. Because I remember I put it in a drawer above

the computer and I can't find it. [A radio transmission is heard in the background] I was hoping you took it you back when you, you took it by mistake (inaudible) you know (inaudible).
RESPONDENT: (inaudible) No, no, I don't have it.
MERCADO: Okay. Okay (inaudible). You want, you want my cell phone number?
RESPONDENT: This is your cell right? The 914?
MERCADO: Yeah. 914-224-1260. If you call me, call me on this.
RESPONDENT: Where are you now? You're at the Police Shop?
MERCADO: No, I'm off. I'm off today. I'm out in the street. I went to buy a suit.
RESPONDENT: All right. Let me call you back. I got to, I'll call ya later. All right brother. 'Bye.
MERCADO: 'Bye.

On cross-examination, Donovan recalled that at the time the tape-recorded controlled conversation took place, the Respondent was on duty at the Manhattan North Task Force. On April 22, 2008, Donovan interviewed Aponte, the tailor at the shop. When he asked Aponte who would go down stairs to the basement, Aponte responded, "Only close friends, not police officers."

On redirect examination, Donovan was questioned as to whether he asked Aponte if the Respondent was a friend of Mercado's. Donovan answered, "No."

The Respondent's Case

The Respondent called Police Officer Randy Zerling as a witness and testified in his own behalf.

Police Officer Randy Zerling

Police Officer Zerling recalled that on Monday, April 28, 2008, he was on duty assigned to the Manhattan North Task Force partnered with the Respondent. They were

performing a "Shawn Bell" detail in a Department vehicle. Zerling was the operator and the Respondent was the recorder. Shortly after 11:00 a.m., as they were driving on West 125th Street between 6th and 7th Avenues, they were flagged down by a cab driver who had a passenger inside his cab. The Respondent spoke to the cab driver. Zerling heard the cab driver say that "the passenger can't pay the fare." Zerling spoke to the passenger who was an African-American woman. The passenger told Zerling, "I'm meeting someone. They are paying the fare." The woman then stated, in a sarcastic tone, "Don't shoot me." The woman eventually agreed to pay the fare.

He made entries in his activity log (RX B) regarding this incident. [These entries read: "1108 - P/U 52 cabbie/customer F/O 209 W125, Lt. Rogers & PO Mongelli on scene. 1135 - 91, passenger paid fare]. He explained that code number "52" indicates a dispute and that "91" is a disposition code which indicates that the dispute was "resolved without a crime."

Zerling recalled that "towards the end of the job," he saw that the Respondent was speaking into a cell phone. Zerling did not know who the Respondent was speaking to and he did not hear any of the conversation.

On cross-examination, Zerling testified that the only document he had reviewed prior to his testimony regarding this incident was the entries he had made in his activity log (RX B). He acknowledged that the woman's sarcastic "don't shoot me" remark is not contained in the entry he made in his activity log.

On redirect examination, Zerling testified that he had gone over the details of this incident in his mind, and that he had reviewed the entry he made in his activity log regarding this incident, shortly after April 28, 2008, because the Respondent had asked

him about this incident soon after the Respondent was served with charges and placed on modified duty.

The Respondent

The Respondent testified that the balance he owed to the New York Police Shop for his dress uniform was \$500, not \$140 to \$160 as Mercado testified. The Respondent testified that he had purchased other Department-required equipment from the shop and that he never had a balance due of \$140 on any of these purchases. He picked up his dress uniform at the New York Police Shop during November, 2003, and paid the \$500 balance due. The Respondent graduated from the Police Academy on January 1, 2004.

The Respondent offered into evidence a check dated September 22, 2003, drawn on Vanguard Fiduciary Trust Company and made payable to the Respondent in the amount of \$22,736.01 (RXC). The Respondent also offered into evidence two bank statements for a "Union Club" checking account in his name in trust for Elma Pilger, his mother. The statements cover all account transactions between October 20, 2003 and December 19, 2003 (RXD and E). The Respondent referred to this account as "a joint checking account" and he testified that the funds in the account were "my money." Between October, 2003 and December, 2003, his mother signed all of the checks on this account to "pay all the bills" while he "was in the Police Academy studying."

On April 28, 2008, he was the recorder and Zerling was the operator of their vehicle when a cab driver flagged them down, pulled his cab up to their vehicle and then ran over to their vehicle to complain that the passenger had refused to pay her fare. The Respondent asserted that he was not focused on what Mercado was saying to him during

their cell phone conversation. He did not know what Mercado was talking about so he told Mercado to hold on and that he would call him right back. He was distracted during this conversation since he and his partner were "in the middle of handling a dispute" between the cab driver and his female passenger which could have involved a gun. The Respondent recalled that the female was "crying hysterically" and pleading, "Don't shoot at me. Please don't shoot me." The dispute resulted in the response of other units to the scene.

The Respondent testified that when Mercado telephoned him the next day, April 29, 2008, he was not involved in any police action and, as a result, he was completely focused on what Mercado was saying to him during their conversation. He had no idea what Mercado was referring to and he told him so.

On cross-examination, the Respondent testified that he and Mercado were "friendly" and he was going to give Mercado a bottle of tequila for Christmas. The Respondent asserted that when he picked up his Class A dress uniform at the New York Police Shop during November, 2003, he paid the \$500 balance due in cash. He withdrew this cash from a bank account but he could not recall what date he did this. When he was asked, "Do you normally have \$500 laying around the house?" he answered, "I have cash laying around the house." The Respondent testified that he was unable to find a receipt from the New York Police Shop documenting his claim that he had paid \$500 in cash for his Class A dress uniform.

The Respondent recalled that his cell phone conversation with Mercado on April 28, 2008, began before the cab driver flagged them down and pulled his cab up to their vehicle. The Respondent acknowledged that at his Official Interview on May 9, 2008, he

told his interviewers that when Mercado telephoned him on April 29, 2008, "My tone changed because I realized this guy is trying to set me up."

The Respondent offered into evidence the tape-recording of a controlled telephone conversation Mercado initiated with the Respondent on April 29, 2008 (RX A, Track 6):

MERCADO: Hello?
MERCADO: Hello?
RESPONDENT: Yeah Mercado, what's going on? My phone fell in a puddle at work and it's, it's kinda messed up.
MERCADO: Oh.
RESPONDENT: What's, What's going on, bro?
MERCADO: Can I, Can I talk?
RESPONDENT: Uh, yeah sure. I left you a message yesterday, you said I never called you back.
MERCADO: Uh, no, uh, I been up most of the night, I been looking for that fucking thing we were talking about yesterday, and I...
RESPONDENT: I don't know what thing you're talking about Fred. Uh, I had a dispute er uh, the other day, yesterday when you were talking to me, wha, what are you talking about?
MERCADO: The... the thing that you gave me, the little twenty-two uh...
RESPONDENT: I didn't give you nothin, bro. I don't know what you're talking about. I mean, you're talking to me on the phone, uh and I don't know what you're talkin about.
MERCADO: Alright, okay.
RESPONDENT: Alright, I'll see you, I'll see you, I'll come see ya.
MERCADO: Alright.

FINDINGS AND ANALYSIS

Specification Nos. 1 and 2

It is charged that the Respondent committed the crimes of Criminal Possession of a Weapon in the Third and Fourth Degrees and Criminal Sale of a Weapon in the Third Degree, and that he engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, in that he possessed a defaced firearm and in that he gave

this firearm to Mercado in exchange for having Mercado wipe out the account balance the Respondent owed for merchandise he had purchased at the New York Police Shop.

Mercado testified that he and the Respondent were alone in the store's basement when the Respondent handed him a defaced .22 caliber pistol that the Respondent said belonged to his mother in exchange for Mercado marking the Respondent's dress uniform order as paid in full.

Mercado acknowledged that he suffers from depression, anxiety and paranoia, and that he attempted to commit suicide by shooting himself with this .22 caliber pistol. Mercado also acknowledged that he initially lied to investigators when he told them that he had found the .22 caliber pistol. Mercado has filed a lawsuit against the Respondent and the City of New York. Finally, Mercado acknowledged that, although he has received no promise of a reduction in his sentence in exchange for his testimony, he is seeking a reduced sentence and the prosecutor has promised to make the sentencing judge aware of his cooperation.

Since Mercado has a history of mental health problems, and since he initially told investigators that he had found the .22 caliber pistol, and since he had a motive to lie at this trial because he is seeking a reduced sentence and because he has a pecuniary interest in his lawsuit, the credibility of Mercado's claim that the Respondent handed him a defaced .22 caliber pistol hinges on whether the Department presented independent evidence which directly corroborates this claim. I find that the tape recording of his monitored telephone conversation with the Respondent on April 28, 2008 (DX 2) constitutes strong independent evidence because the Respondent's own words directly corroborate Mercado's claim.

When Mercado asked the Respondent about “that little thing you gave me that belonged to your mother,” the Respondent answered, “Yeah.” When Mercado then says “a little twenty-two,” the Respondent again states, “Yeah.” (DX 2A p. 4). The fact that the Respondent provided two unequivocal affirmative responses to Mercado’s question about “that little thing you gave me that belonged to your mother...a little twenty-two,” shows that the Respondent knew exactly what Mercado was referring to and constitutes a confirmatory acknowledgement by the Respondent that he had in fact handed Mercado “a little twenty-two” that belonged to his mother.

The Respondent further incriminated himself in his responses to Mercado’s questions regarding whether he had retrieved the “little twenty-two.” When Mercado asked the Respondent, “Did you take it? Because Pete’s renovating the basement and I don’t want him to find it,” the Respondent answered, “No...”

The Respondent’s unequivocal “no” response to Mercado’s question and the fact that the Respondent does not ask what “it” is or why Mercado is concerned that Pete will find “it” in the basement, constitutes corroboration of Mercado’s testimony that the Respondent handed him the .22 caliber pistol while they were in the basement of the New York Police Shop and that Peter Martinez, the owner of the shop, was unaware of this transaction. That the Respondent clearly understood what Mercado was referring to by the term “it” is established by the fact that the Respondent does not ask what “it” is and by the fact that he twice denies that he took “it” back or that he has “it.” When Mercado asks him, “You don’t have it? Did you, did you take it...?” The Respondent states, “No. I don’t have nothing.” When Mercado then states, “All right, because I remember I put it in a drawer above the computer and I can’t find it; I was hoping you took it back when

you, you took it by mistake...you know²...,” the Respondent again states, “No, no, I don’t have it.”

I also find it significant that Sergeant Donovan corroborated Mercado’s testimony that Mercado had, on his own initiative, proposed that Donovan tape record a telephone conversation between himself and the Respondent during which he would try to get the Respondent to talk about the exchange of the .22 caliber pistol. If Mercado had invented the exchange of the .22 caliber pistol, it is unlikely that he would have volunteered to initiate a monitored conversation with the Respondent because if the Respondent had refused to speak to him or had made denials, Mercado would look bad in front of not just Donovan but also the Assistant District Attorney who was handling his prosecution.

Finally, Mercado’s testimony that in return for receiving the pistol he agreed to alter sales records to falsely reflect that the Respondent had paid the balance due on his uniform in full is believable because this testimony constituted an admission against his penal interest in that he acknowledged that he had defrauded his employer Martinez, the store’s owner.

The Respondent asserted that he was not focused on what Mercado was saying to him during their cell phone conversation because he was distracted during this conversation since he and his partner were dealing with a female who was “crying hysterically” and pleading, “Don’t shoot at me. Please don’t shoot me.” The Respondent called his former partner Zerling as a witness regarding his testimony about the female. However, Zerling recalled that the female passenger had “sarcastically” stated, “Don’t shoot me.” Moreover, Zerling testified that he, not the Respondent, was dealing with this

² Although the word “computer” and the phrase “it by mistake” are not contained in the transcript offered by the Assistant Department Advocate (DX 2A), these words are audible on the tape recording (DX 2).

female passenger and he did not allege that he had distracted the Respondent from his phone conversation by calling to him or otherwise indicating to him that he needed his assistance. Also, although the Respondent asserted that his cell phone conversation with Mercado began before the cab driver flagged them down and pulled his cab up to their vehicle, Zerling testified that the Respondent had already spoken to the cab driver and that the Respondent's cell phone conversation took place "towards the end of the job." As a result, I find that Zerling's testimony does not provide corroboration for the Respondent's claim that the female was crying and that she was such a distraction that he was not focused on his conversation with Mercado.

Most significantly, the Respondent's contention that he was not focused on the conversation is not supported by the tape recording of the conversation. Although the Respondent asked Mercado, "Can I call you right back?" the Respondent answered numerous questions posed by Mercado and the Respondent provided detailed information on a wide variety of topics including: how many arrests he has made; how many medals he has been awarded; what a "CPI" is; why he was unable to become a Port Authority police officer (including a detailed history of the court decisions regarding this matter); that he is planning on taking the Sergeant's examination again; what his score was on the most recent exam; what commands he was assigned to; and other topics.

Moreover, I find it significant that Mercado did not bury his reference to the "little twenty-two" inside other non-related questions. On the contrary, right before he brought up the subject of the "little twenty-two," Mercado specifically alerted the Respondent to concentrate on what he was about to say by telling the Respondent, "I'm

going to tell you why I called.” Based on this record, I reject the Respondent’s claim that he was not focused on what Mercado was saying to him during their conversation.

With regard to the tape recording of the monitored telephone conversation between Mercado and the Respondent on April 29, 2008 (RX A) offered in evidence by the Respondent, I find that it does not serve to negate the admissions the Respondent made the previous day. The Respondent testified at this trial that since he had not given Mercado a small .22 caliber pistol, he had no idea what Mercado was referring to when he started to talk about “the thing that you gave me, the little twenty-two...” Yet, in this conversation when Mercado mentions “the little twenty-two,” the Respondent does not wait for Mercado to further describe what he is referring to by the term “the little twenty-two.” Rather, the Respondent immediately interrupts Mercado and adopts a defensive posture by stating, “I didn’t give you nothing, bro. I don’t know what you’re talking about.” If the Respondent truly had no idea what Mercado meant by the term “little twenty-two,” it is likely that the Respondent would have asked Mercado what he was referring to or at least have allowed him to continue to describe it. As a result, I find that this conversation also shows that the Respondent clearly understood what Mercado was referring to when he used the term “little twenty-two.”

I also find the Respondent’s next statement to Mercado, “I mean, you’re talking to me on the phone, uh, and I don’t know what you’re talking about,” to be significant. The Respondent’s specific reference to the fact that Mercado had raised the subject of “the thing that you gave me, the little twenty-two” while they were talking “on the phone,” reflects that the Respondent is concerned about talking with Mercado about the “little

twenty-two" on the telephone and it indicates, as the Respondent acknowledged at his Official Interview, that the Respondent was now suspicious of Mercado.

Finally, the Respondent admitted that he could find no receipt documenting his claim that he had handed over \$500 in cash at the shop as payment for the balance owed on his Class A dress uniform. Although the Respondent offered bank records (RXC, D and E) to show that he was not financially strapped during the fall of 2003 and that he had more than sufficient funds to pay for a dress uniform, he produced no bank record or other evidence to corroborate his claim that during November, 2003, he paid \$500 in cash at the shop to cover the balance due on his dress uniform. These bank records do not support his claim that he paid \$500 in cash at the shop because these records show no cash withdrawals between October 20, 2003 and December 19, 2003 from this bank account (RXD and E).

Based on the above, the Respondent is found Guilty of Specification Nos. 1 and 2.

Specification No. 3

It is charged that the Respondent utilized Department computers for a non-Department, or other unauthorized, purpose in that he performed a computer inquiry on his brother.

The Respondent admitted that he had used a Department computer to perform a purely personal computer inquiry regarding his brother Roger. As a result, the Respondent is found Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty of misconduct which constitutes the crimes of Criminal Possession of a Weapon and Criminal Sale of a Weapon, and of engaging in conduct prejudicial to the good order, efficiency and discipline of the Department, in that he gave a defaced firearm he possessed to a sales clerk at a police equipment store in exchange for the clerk's action of eliminating the account balance the Respondent owed for merchandise he purchased at the store. The Respondent has also been found Guilty of utilizing a Department computer for a personal, non-Department unauthorized, purpose by performing a computer inquiry on his brother.

The Respondent engaged in criminal conduct by handing a defaced firearm to a store clerk in order to obtain the personal benefit of not having to pay the balance he owed to the store for merchandise he had purchased. This extremely serious intentional criminal misconduct reflects poorly on the Respondent's personal integrity and his fitness to serve as a member of this Department. As a result, I am left with no alternative but to recommend that he be DISMISSED from the New York City Police Department.

Respectfully submitted,

APPROVED

JUN 16 2009
RAYMOND W. KELLY
POLICE COMMISSIONER

Robert W. Vinal
Assistant Deputy Commissioner - Trials